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Supreme Court, U.S.
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No. 04-1135

IN THE

Supreme Court of the United States

VILASINI NAIR KOTTARAM,

Petitioner,

v.

BANK LEUMI, USA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Bank Leumi, USA certifies that it is a subsidiary of Bank Leumi le-Israel Corporation. Bank Leumi le-Israel B.M. is the parent company and the owner of all of the shares of Bank Leumi le-Israel Corporation. No other company has an ownership interest of 10% or more in Bank Leumi, USA.

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Respondents Bank Leumi USA ("Bank Leumi"), Joseph A. Sciarillo, Robert M. Cassuto, Julie Sheifetz and George R. Penny (together, "Respondents") request that this Court deny the petition of Vilasilini Nair Kottaram ("Kottaram") ("Petitioner") for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit ("Second Circuit") entered on August 3, 2004.

STATEMENT OF THE CASE

This action involves a condominium building known as the Crown Plaza Condominium, a six-story, 29-unit condominium building located at 54-09 108th Street, Corona, Queens. Petitioner is the owner of one condominium unit, having purchased the unit from the original sponsor, B-F Corona Holdings, Inc., on May 31, 1995.

Almost seven years later, through counsel, Petitioner commenced this action against Bank Leumi, whose only involvement with the Crown Plaza Condominium was as the holder of a 1989 mortgage loan to B-F Corona, the original sponsor.[1] In 1996, B-F Corona defaulted on the mortgage

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1. Petitioner was initially represented by counsel, Satish K. Bhatia. However, during the course of the District Court proceedings Petitioner made a motion to discharge her counsel because counsel had become "uncooperative and obstinate." She then opted to proceed *pro se*. In addition, Petitioner's husband John Felix ("Felix') was never a party to the district court action as Petitioner filed a motion to join Felix as a plaintiff, but the district court denied this request. However, Petitioner included Felix's name on her Notice of Appeal to the Second Circuit. The Second Circuit included a footnote in its August 3, 2004 decision in which it explained that although Felix's name appeared in the Court's official caption, he was not a proper party to the appeal. (Pet. at 9).

and Bank Leumi foreclosed on its collateral — the unsold condominium units — and subsequently sold its position to an affiliate, EOR Fifty-Five of New York, Inc ("EOR"). EOR became the subsequent sponsor.

Petitioner's complaint alleged a cause of action under RICO, claiming essentially that Respondents: (i) engaged in the criminal acts of "wire fraud" and "mail fraud" because the condominium's offering plan "misrepresented" that condominium units would be sold to individuals exclusively for use as their primary residence; and (ii) that substandard materials were used in the construction of Petitioner's unit resulting in repairs to the roof and the plumbing and heating systems. (Petition for Writ of Certiorari ("Pet."), at 24-41).

In dismissing Petitioner's Complaint, the District Court correctly held that Petitioner had failed to comply with the RICO statute's rigorous pleading requirements and, that in any event, those claims were time-barred as they were brought outside of RICO's four year limitations period. Having dismissed the only federal claim that was properly before it, the District Court declined to exercise supplemental jurisdiction over any pendant state law claims. (Pet. at 13-14).

In an attempt to circumvent RICO's four-year statute of limitations, Petitioner's brief to the Second Circuit focused on a new cause of action; that the Respondents somehow violated the Condominium and Cooperative Conversion Protection and Abuse Relief Act, P.L. 96-399, 15 U.S.C. § 3601, *et seq.* (the "Condominium Act"), a statute addressing long-term self-dealing contractual arrangements entered into by a condominium sponsor ("sweetheart deals"), because the Sponsor, not Bank Leumi, exercised its rights under the

offering plan to appoint its representatives to the condominium's Board of Managers (the "Board") until the last condominium unit was sold. Thus, Petitioner contends, the Board was not illegally constituted and its decisions (such as the raising of common charges) are void.

The Second Circuit properly ordered the appeal DISMISSED because it lacked "an arguable basis in law or fact." It also denied Petitioner's other pending motions, such as denying its motion to stop the Defendant Ramesh C. Vig from claiming legal fees; (ii) denying Petitioner's motion for a certificate of appealability as "unnecessary"; and (iii) denying petitioner's motion for an "emergency restoration order." (Pet. at 8-9).

Petitioner now claims, in its application before this Court, that the failure of the courts to enforce the Condominium Act is jeopardizing the "Housing of this Country" and resulting in exploitation by the "MIGHTY PEOPLE." (Pet. at 7). Petitioner's latest argument is consistent with her voluminous submissions to the courts which in which she has unleashed a torrent of rambling, incoherent and libelous attacks on Bank Leumi and its current and former employees. In fact, in an affirmation for the District Court, Petitioner went so far as to claim, without a shred of substantiation, that Bank Leumi, a mere mortgage holder of a construction loan for the original sponsor back in 1989, is actually a criminal enterprise and set up exactly like an "organized crime family." (Petitioner's Affirmation Opposing Declaration of Defense Counsel & Demanding Answers to Charges or Summary Judgment at 11).

Petitioner's outrageous and untrue allegations are simply an attempt to mask the truth that she has utterly failed to

state a viable claim against Respondents. Instead, the only thing Petitioner has accomplished in this case is to unnecessarily multiply these proceedings by filing numerous, frivolous motions — including two in the Second Circuit seeking an order related to a water leak in her apartment — containing hundreds of pages of irrelevant argument and annexing thousands of pages of exhibits that have nothing to do with the claims at issue.

Simply put, Petitioner's claims, at best, amount to a time-barred negligence or breach of contract action against the original Sponsor, as this action seeks nothing more than recovery for alleged damages to Petitioner's condominium unit incurred in June 1995 — more than six (6) years before the action was commenced. In sum, this is not a RICO case (the cause of action asserted in the Complaint); it is not a case about a violation of the Condominium Act (a statute relied upon as a basis for jurisdiction in the Complaint); and it is certainly not a case requiring the review of this Court. Thus, as the District Court and the Second Circuit both properly found, the allegations against Respondents are untimely, unsupported, completely unfounded, do not give rise to a cause of action of any kind and "lack an arguable basis in law or fact". (Pet. at 8-9, 13-14).

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because it satisfies none of the criteria specified by this Court's rules or decisions for issuance of the writ. The decision below does not conflict with a decision of this Court or any Court of Appeals. This claim was first styled as a RICO action and, before the Second Circuit, was reinvented by Petitioner as a violation of the Condominium Act. The District Court and the Second Circuit have both heard and considered the arguments raised by Petitioner, and both courts have summarily dismissed these claims. Petitioner has no cognizable claim against Respondents, yet she persists in filing a flurry of frivolous motions and appeals which are both burdensome and costly for Respondents and the judicial system.

While Respondents submit that the Condominium Act claim is not properly before this Court — because this was not a cause of action asserted in the underlying Complaint — should the Court decide to consider these allegations, the well established law of the Second Circuit mandates a finding that no such claim may lie against Respondents here. In addition, the question presented by Petitioner for review is whether the Condominium Act is "a valid law to be enforced by the Courts." (Pet. at i). There is no underling decision, however, questioning the validity of the Condominium Act. Rather, the District Court and the Second Circuit have determined that the Condominium Act has no application to the facts of this case. Because this is the only question presented by Petitioner before this Court, her petition should be denied.

I.

PETITIONER'S CLAIMS OF A VIOLATION OF THE CONDOMINIUM AND COOPERATIVE CONVERSION PROTECTION AND ABUSE RELIEF ACT WERE NOT OVERLOOKED OR IGNORED BY THE DISTRICT COURT AND THE SECOND CIRCUIT

As part of the questions presented for review by this Court, Petitioner alleges that the District Court and the Second Circuit did not address her claims of violations of the Condominium and Cooperative Conversion Protection and Abuse Relief Act, P.L. 96-399, 15 U.S.C. § 3601, *et seq.* (the "Condominium Act"). Petitioner incorrectly interprets the courts' silence on this issue as meaning that the allegations were not addressed. The fact that the courts below did not discuss every argument alleged by Petitioner does not mean that these arguments were overlooked or "ignored". (Pet. at 2).

Although the Petitioner's claim regarding the Condominium Act was not properly before the courts because it was not asserted as a cause of action in the Complaint and because Petitioner never sought to amend the Complaint to include such a claim, it was nonetheless addressed by Respondents in their papers because a *pro se* plaintiff's complaint is entitled to the most generous reading possible. Both the District Court and the Second Circuit were therefore fully briefed on the relevant issues (or lack thereof) and both Courts, after evaluating these contentions as well as the others alleged, chose to deny Petitioner's claims as a whole.

II.

EVEN IF THE COURTS BELOW DID NOT ADDRESS THE CONDOMINIUM ACT, IT DOES NOT APPLY IN THIS CASE AND HAS NOT BEEN VIOLATED

Petitioner claims that Respondents violated the Condominium Act because: (i) EOR (the entity that purchased the unsold condominiums after a foreclosure sale) elected to appoint its representatives Sheifetz, Cassuto and Penny to the Condominium's Managing Board (Pet. at 34-35); and (ii) because the Condominium Act defines condominium association as "the organization, whose membership consists exclusively of all of the unit owners in the condominium project, which is, or will be, responsible for the operation, administration, and management of the condominium project," 15 U.S.C. § 3603(4), the presence of the Sponsor's representatives on the Board in accordance with the offering plan somehow forms a basis for a claim.

Petitioner's arguments were properly rejected. As discussed below, the Condominium Act does not prohibit a sponsor from appointing its representatives to the condominium's managing board in accordance with the condominium's offering plan, until the last condominium is sold. Moreover, with respect to Petitioner's second point, and as explained in Respondents' submissions below, EOR was the owner of all of the unsold condominium units, was a "unit owner" within the meaning of 15 U.S.C. § 3603(4) and was entitled, under both the Condominium Act and the offering plan, to sit on the Board until the last unit was sold. Significantly, EOR was not even named as a defendant in this action. Having now had three bites at this apple, in the New York City Civil Court, the District Court, and the Second

Circuit, Petitioner has now, for the fourth time, failed to show how the Board was illegal.

The stated purposes of the Condominium Act are to: (i) minimize the adverse impacts of condominium or cooperative conversions on housing opportunities of low income individuals, the elderly and the handicapped; (ii) assure that fair and equitable principles are followed in the establishment of condominium and cooperative opportunities; and (iii) to provide appropriate relief where long term leases of condominium or cooperative related facilities are determined to be unconscionable. 15 U.S.C. § 3601(b). Moreover, all four elements listed in § 3607(a) must be present for a condominium association to terminate self-dealing contracts. *Board of Managers of Charles House Condo. v. Infinity Corp.*, 21 F.3d 528, 532 (2d Cir. 1994) (For the contract to be terminable under the Condominium Act it must (1) provide for operation, maintenance or management of a condominium .. . (2) be between the unit owners or a condominium association and the developer or an affiliate of the developer; (3) have been entered into while such association was controlled by the developer through special developer control; and (4) must be for a period of more than three years).

The Condominium Act gives condominium unit owners, or a condominium association, the opportunity to challenge sweetheart deals that the developer entered into with the condominium association. *See e.g., Park South Tenants Corp. v. 200 Cent. Park South Assoc.*, 941 F.2d 112, 114 (2d Cir. 1991) (holding that the plain language of the Condominium Act awards a cooperative association the right to terminate so-called sweetheart leases within § 3607's two year window.) As such, the Condominium Act simply has no application to

Petitioner's claims against Respondents who are the former holder of the mortgage on the unsold condominium units. *Bleecker Charles Co. v. 350 Bleecker Street Apt. Corp.*, 327 F.3d 197 (2d Cir. 2003) (holding that to be terminable under the Condominium Act, the relevant contract must first provide for the operation, maintenance or management of the condominium, must be between the unit owners and the developer or an affiliate, must have been entered into when the developer controlled the condominium and must extend for more than three years); *2 Tudor City Place Assocs. v. Tudor City Tenants Corp.*, 924 F.2d 1247, 1251 (2d Cir. 1991) (holding that the Condominium Act allowed the tenants to terminate a garage lease with an affiliate of the developer); *Board of Managers of Charles House*, 21 F.3d at 533 (holding that the "termination provision of the Act was designed to prevent sponsors from binding *tenants* to long-term, self-dealing Leases.") (emphasis in original).

Thus, it is clear that the Condominium Act was meant to address developer self-dealing, and, accordingly, has no application to Petitioner's claims against Respondents. *See e.g.*, 15 U.S.C. § 3601(a)(3) ("Congress finds and declares that ... certain long-term leasing arrangements for recreation and other condominium-or cooperative-related facilities which have been used in the formation of cooperative and condominium projects may be unconscionable"); *Board of Managers of Charles House Condo.*, 21 F.3d at 531 ("By enacting § 3607, Congress established a non-judicial remedy for condominium associations and unit owners to terminate long-term self dealing contractual arrangements.")

In any event, claims under the Condominium Act may only be brought where "the owners of two-thirds of the units

other than those owned by the developer or its affiliates . . . vote for termination," *Bleecker Charles Co.*, 327 F.3d at 199, and not by a single unit owner as in this case.

Additionally, the mere fact that certain current or former employees of the Bank are principals of EOR, does not allow Petitioner to impose liability on either the Bank or these individuals for EOR's conduct. *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1053 (2d Cir. 1997) (holding that the corporate veil cannot be pierced "in the absence of a showing that this control was used to commit [a] wrong, fraud, or the breach of a legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights, and that the control and breach of duty proximately caused the injury complained of.") Accordingly, because Petitioner has not stated a cognizable claim for relief under the Condominium Act against the Bank or the individual employees, this Court should deny its petition.

Should Petitioner wish to attempt to challenge the validity of any lease or other contract or agreement between the Sponsor and the condominium association as "unconscionable" she is, of course, free to do so. However, it is clear that the allegations contained in the Complaint fall well short of the conduct regulated by this statute, therefore the Condominium Act has not been violated as it is not applicable to this case. *See e.g.*, *Coliseum Park Apartments Co. v. Coliseum Tenant Corp.*, 742 F. Supp. 128 (S.D.N.Y. 1990); *Bleecker Charles Co.*, 327 F.3d 197; *Board of Managers of Charles House Condo.*, 21 F.3d 528.

Lastly, to the extent that Petitioner is seeking to use § 3607 of the Condominium Act to terminate any lease or other contract entered into between the condominium and

the Sponsor, this claim is time barred by the two-year limitations period contained in that section. 15 U.S.C. § 3607(b). To the extent that Petitioner is seeking any other relief under the Condominium Act, those claims are likewise time-barred by that statute's catchall six-year limitations period. 15 U.S.C. § 3613. Because EOR became the Sponsor on or about August 7, 1996 and Petitioner did not commence this action until more than six years after that date, their Condominium Act claim would, in any event, be time-barred.

III.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO UNDERLYING DECISION INVALIDATING THE CONDOMINIUM ACT

The question presented by Petitioner for review by this Court is whether the Condominium Act is a "valid law[] to be enforced by the courts" (Pet. at i). Petitioner seems to misapprehend that there is no question about whether or not the Condominium Act is a valid law. There is no underlying decision anywhere which holds that the Condominium Act is invalid. The issue here is not whether the Condominium Act is valid, but rather if the Condominium Act was violated.

In its August 3, 2004 decision, the Second Circuit denied all of Petitioner's motions and dismissed their appeal stating that it lacked "an arguable basis in law or fact." Citing 28 U.S.C. § 1915(e)(2)(B)(i) as well as *Neitzke v. Williams*, 490 U.S. 319 (1989), the Court properly concluded that Petitioner's case was frivolous or malicious and should be dismissed. As this Court explained in *Neitzke*, 28 U.S.C. § 1915 "accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but

also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Id.* at 327. In denying Petitioner's claims, the Court implicitly stated that the Condominium Act did not apply to this case and was not violated.

The Condominium Act addresses long-term self-dealing contractual arrangements entered into by a condominium sponsor. Thus the act was designed to allow a condominium association or a group of unit owners to terminate certain self-dealing contracts entered into by the sponsor during the period of its control of the condominium. This statute thus has no application to Petitioner's claims that Respondents somehow acted improperly when EOR, as an owner of unsold condominium units, appointed certain of its employees to the Board in accordance with the terms of the offering plan. Because the Second Circuit did not in anyway hold that the Condominium Act is "invalid," Petitioner's application for a determination as to the validity of the Act has no merit.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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